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METHODS OF LEGAL EDUCATION.

I.

BY HON. EDWARD J. PHELPS,
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My opinion is asked in respect to the methods of legal instruction. I am not an authority upon that subject. My connection with it has been too limited and too brief to entitle any conclusions of mine to be placed in comparison with those of gentlemen who by long and honourable service have attained a distinguished reputation in that important field. Such views as I have, are not derived from consideration of systems of study, but from observation of their results. I have paid little attention to the processes of culture, but have had large opportunities to observe the harvest, for my acquaintance with the profession in all its grades has been long and wide.

Men of exceptional intellectual power, or specially qualified by the character of their minds to deal with legal principles, will reach distinction, if they devote themselves to that pursuit, in spite of all disadvantages of education. Some great lawyers have had no more fortunate beginning than the study of a tattered Blackstone by the light of a pine-knot fire. There is another class of students, unfortunately, to whom no facilities of instruction, however excellent, will prove useful. They are either those who are lacking in mental capacity, or in natural adaptation to the study of law—for capacity is more frequently adaptation to the work in hand than is always remembered—or they are those who

cannot or will not bring themselves to perform the necessary labour. Some young men are disposed to regard the profession of the law as a genteel way of getting a living without work, or as a convenient introduction to that highest of American ambitions, the holding of some sort of public office. In the latter expectation they may perhaps succeed, as it does not usually much depend upon intellectual qualities; in the former they will not fail to find out their mistake, perhaps after it is too late. But the man of fair abilities, sufficient to have insured him a satisfactory if not a brilliant success, and willing to do the work that is necessary in order to make the most of himself, not infrequently fails to achieve much at the bar. And it has seemed to me that the reason is generally to be found in the lack of the mental discipline and the true foundation of legal knowledge, which must be acquired, if at all, in early life and in educational studies. The want of these is rarely overcome. He who sets out in the wrong direction, is likely to get further away from his course the longer he travels. The building that is erected upon an incomplete and insecure foundation, however it may be elaborated and wrought over in its upper storeys, is never strong or permanent. When the rains descend and the floods come, it will be seen to be founded upon the sand.

The very first and indispensable requisite in legal education, without which there can be none that is worthy of the name, is the acquisition of a clear and accurate perception, a complete knowledge, a strong, tenacious grasp of those unchangeable principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its application to human affairs. That should be the work of the law school, to the student who is happy enough to enjoy its privileges. If it does that for him, it does quite enough, and all there is time for. If it fails to do that, it does nothing that is really worth while. If the student goes out from it with hazy and uncertain conceptions, and vague and indefinite knowledge, if he is enriched only by a vast and varied misinformation, and a widely extended misunderstanding, he had better address himself to almost any other profession for which he is disqualified, than to the profession of the law. And it is certain that his mental habits will be of the same character as his acquirements.

If I were to venture upon any criticism of the system of instruction that is now, so far as I know, universally in vogue in these institutions, because universally demanded, I should say that they attempt too much for the time at their disposal, and the

capacity of their average students. In establishing their standard they fix their eyes rather upon what should be accomplished at the end of a lawyer's career than at its beginning. They cover too much ground; they burden the student with too much reading, too much instruction, too many topics. They cram him with more than he can digest; they load him with more than he can carry. The culture he receives is too wide to be deep. The mental discipline, without which knowledge is only an encumbrance, is sacrificed or impaired in the overstrained effort at accumulation. Learning is made to take the place of knowledge, and knowledge outruns strength. No man, certainly, can evolve a mastery of the law out of his own inner consciousness; it must be obtained by study, and the real lawyer must be a student in earnest, all the days of his life. But on the other hand, mere learning can never make a lawyer. The faculties of acute and accurate perception, of seeing things just as they are, of strong logical reasoning, and of a high and clear sense of justice, must be formed and trained and incorporated into the mind, as legal knowledge is acquired. The process therefore, cannot with most men be very rapid. Excellence will be found a plant of slow growth. Study should consist not merely in reading and hearing, but in reflection; so that what is received may be thoroughly mastered. The unhappy tendency of our time, not merely in schools but to a considerable degree in the profession and in the courts, is to encumber the law with much that is called learning, sought to be deduced from millions of heterogeneous, often irreconcilable, and sometimes incomprehensible cases, each of which, instead of being a decision upon the point involved, is a dissertation upon the general law of the subject. The terse clear and logical judgments that are found in the earlier English and American reports, in which conclusions are deduced from principles, instead of from other conclusions, are not now much in fashion. It is easy to find single opinions in which more authorities are cited than were mentioned by Marshall in the whole thirty years of his unexampled judicial life, and briefs that contain more cases than Webster referred to, in all the arguments he ever delivered. To plunge a student into this chaos, with his powers untried and imperfect, and his knowledge of principles incomplete, to grope his way through it as best he may, and to triangulate from case to case, supposing that he is getting forward when he is only going astray, is not to educate him, but tends rather to make him proof against education. If the time comes when he can encounter it with the discrimination that is born only of a lucid conception

of legal principles, he may be more safely trusted in a great law library, without danger of being conducted "by learned reasons to absurd decrees." He will then see how cases may illustrate the application of principles which they do not create and cannot destroy; that the law is, after all, the science of justice, as far as justice can be made effectual by general and established rules; and that its warrant and its eulogy are only to be found in "the good justice that is done in the land."

If I were to frame a law school upon my own old-fashioned idea of what it should be, it would attract no students. It would be like the common school by the side of the academy. The slenderness of its library—small but well selected, rich principally in what it did not contain, and jealous of new accessions—the simplicity of its curriculum, the moderation of its speed, the apparent modesty of its extent of attainment, would be likely to excite derision. Such was the school which I had the advantage of attending in the happy days of my youth. Out of such schools and from the same system of instruction outside of them, have come a large proportion of the greatest lawyers I have ever seen, or ever expect to see. What was taught there was only fundamental, but it was taught effectually. It sank into the student's mind, and wrought itself into his ideas and his modes of thought. The habit of reasoning from principles to conclusions gave him, if he was capable of attaining it, the large comprehension and strong logical power which are the characteristics of the sound lawyer, and the true weapons of the advocate. On the foundation thus formed, the superstructure can be rapidly built in after life. To a mind so trained, no legal propositions however new will be difficult; no complication of facts however unusual will embarrass the application of the rules of law, or put justice out of court. Beware of the man of one book, is an old proverb. Beware of the lawyer of few books, wisely chosen and entirely understood, is a good adaptation of the proverb to the matter in hand. Asking lately the leader of the Connecticut Bar, how it came to pass that the lawyers who framed the United States Constitution had obtained such a mastery of legal principles and such a clearness in the expression of them as are there displayed, he replied, "Why, they had so few books!"

I would confine therefore, the business of the law school, were it left to me, chiefly to the groundwork of the law. This I would try to have taught with extreme thoroughness. *Multa non multis* should be the motto. And I would regard mental discipline, habits of thought, and the learning how to think

clearly, accurately, and with the confidence that can only come from the consciousness of a sure foundation, as far more important than the premature accumulation of much knowledge. This would leave a good deal for future acquisition, it is true, but, as it seems to me, the deficiency would be more than compensated by the enlarged faculty of acquisition, and the effectual planting, broad and strong, of the foundations upon which alone can learning and scholarship usefully repose in practical life.

I have felt less hesitation in expressing these antiquated views, because there is no danger of their being adopted. Institutions must meet the demands of their time, right or wrong, or they will soon cease to be institutions, for the lack of disciples. Public opinion in these times upon any subject that much attracts public attention, flows in currents which sweep everything before them. It is idle to try to go against the stream; one must go with it or be left behind. Education in all its departments, nowadays, is the business of rapidly imparting universal knowledge to all mankind. The end sought is acquirement rather than strength, accumulation at the expense of understanding, quantity instead of quality. This can only be corrected, if it needs correction, by the experience which perhaps may disclose that such is not the way to make strong men.

I may well enough terminate these observations, in the language of a worthy and honest justice of the peace in the State of Vermont, who in rendering judgment in an action that had been sharply contested before him, concluded by saying, "These are my views in respect to this case; I have no doubt about it; very likely I am wrong; I am generally wrong."

II.

BY PROF. WILLIAM A. KEENER, DEAN OF COLUMBIA COLLEGE LAW SCHOOL.

In complying with a request for a statement of the method of instruction in the Columbia College Law School, I must state at the outset that there is no uniform method of instruction, if these words are used as indicating a method which one is expected as a member of the Law Faculty to follow. At Columbia a professor is selected because he is supposed to be qualified for his work, and the method of doing it rests entirely with himself.

What I shall describe is the method pursued in most of the courses because it is thought to be productive of the best results.

That method is, with the modification hereinafter described, the case system as introduced at Harvard. In describing this system I shall state in the first place what *it is not*.

1. It does not consist in the study of isolated propositions of law.
2. It does not proceed on the theory that the law consists of an aggregation of cases.
3. It does not proceed on the theory that to learn law one must *memorize cases*.
4. It does not proceed on the theory that law is to be taught or learned in a law school by the reading of cases merely.
5. It does not leave the student to deduce the principles of law from the cases *by himself*.

What then is the case system? What is the theory on which it is based? What is the use made of the cases?

The case system consists in putting into the hands of the student a number of cases on any given subject, taken not at haphazard but selected by the professor with a view to developing the law on that subject. The theory on which this proceeds is that it is only by regarding law as a science that one can justify its being taught in a university, and regarding it as a science, the student should not only be encouraged to investigate the law in its original sources, but should be distinctly discouraged from regarding as law, what is, in fact, simply the conclusions of writers whose opinions are based upon the material to which the student can be given access.

The case system then proceeds on the theory that law is a science and, as a science, should be studied in the original sources, and that the original sources are the adjudged cases and not the opinions of text writers, based upon the adjudged cases. But the law is an applied science and therefore to appreciate thoroughly the principle involved in a given topic the student should deal with it in its application, and as he learns these principles in their application they are not a mere abstraction, but have assumed to him a concrete form, and he is prepared to apply them in mastering new problems. Instead of reading about principles he is studying and investigating the principles themselves. Under this system the student is taught to look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the mineralogist. It should be remembered that the student is not simply given the specimen and asked to find out as best he can what it is, but each specimen is accompanied by an elaborate explanation and classifi-

cation. In comparing the system of teaching by cases with the ordinary text-book system, it should not be forgotten that the decision of the Court is not simply a judgment for the plaintiff or for the defendant upon a given statement of facts, but that the reasons therefor are given at length, and the opinion of the court giving the reasons for the conclusion reached, is really the only authoritative treatise which we have in our law.

In explanation of the use made of the cases, I shall quote from a statement made by me on another occasion for the purpose of showing that one of the strongest arguments in favor of the system of teaching by cases is the fact that it is so extremely practical :

"A system in which principles are studied in their application to facts would seem to combine in the highest possible degree the theoretical and practical. In no other way can a student so thoroughly acquaint himself with the methods used by judges in applying principles of law to the facts before them. It must be borne in mind that this method of teaching does not consist in lectures by the instructor, with references to cases in support of the proposition stated by him. The exercises in the lecture room consist in a statement and discussion by the students of the cases studied by them in advance. This discussion is under the direction of the instructor who makes such suggestions and expresses such opinions as seem necessary. The student is required to analyze each case, discriminating between the relevant and the irrelevant, between the actual and possible grounds of decision. And having thus discussed the case, he is prepared and required to deal with it in its relation to other cases. In other words, the student is practically doing as a student what he will be constantly doing as a lawyer. By this method the student's reasoning powers are constantly developed, and while he is gaining the power of legal analysis and synthesis, he is also gaining the other object of legal education, namely, a knowledge of what the law actually is."

I might add that the power which this practice gives him of analyzing the complicated facts of a case, and of clearly and concisely stating them, is what in no small degree distinguishes the good lawyer from the poor or indifferent lawyer.

It is evident that the system which I have described is not the system which is described by Mr. J. Bleecker Miller in the December number of the *Counsellor* as follows :

"Of course, teaching by 'case law' is the furthest possible remove from this German system ; teaching by 'case law' went out of use on the Continent over a hundred years ago. To use again our comparison between law and composition, what would we think of a system of teaching the latter which consisted in impressing on the memory of the pupil a number of correctly expressed sentences, from approved authors, and then expecting that the pupil should be able to judge whether a given sentence is rightly or wrongly expressed by comparing it with one of these approved sentences? That is teaching by 'case law.'"

That is not the case system as the phrase is used at Columbia, and I heartily concur with Mr. Miller in his condemnation of such a system. There is no reason for supposing that Mr. Miller had in mind, in making the above statement, the method of instruction herein described, though the statement represents a notion very generally entertained about it.

From my explanation of the system it is evident :

1. That it is not open to the charge of regarding the law as a mere aggregation of cases. Indeed, the system rests on the fundamental doctrine that while the adjudged cases are numerous, the principles controlling them are comparatively few, and can and should be thoroughly mastered.

2. That it does not proceed on the theory of learning law by the reading of cases only, as the student has the constant help of the instructor by way of suggestion, criticism, and the formal statement of propositions of law.

3. That the system, if not open to the objection just mentioned, cannot be open to the objection that the student is required to deduce the principles from the cases *by himself*. Even before the discussions and suggestions of the class room he has the benefit of the opinion of the court in every case, and of the argument of counsel in many cases to aid him in reaching his first impressions.

4. That instead of involving the memorizing of a lot of cases, the danger to guard against is that the student may not have a sufficient regard for decisions which in his opinion are not based on principle. Judge Story's attitude when presiding at a moot court is very much the attitude of the professor and his class in the lecture room. Judge Story is quoted as saying when presiding at a moot court, "Gentlemen, this is the High Court of Errors and Appeals from all other courts in the world. Tell me not of the last cited case having overruled any great principle,—not at all. Give me the *principle*, even if you find it laid down in the Institutes of Hindu law."

5. That as the cases are selected to develop a particular branch of law, nothing is more erroneous than to suppose that the system consists of the study of isolated propositions. To say that the study of cases is only the study of isolated propositions is to deny that the law has been developed through the cases.

It will doubtless interest your readers to know what men other than those engaged in teaching under this system, think of it. I will, with your permission, quote from three or four such persons, whose opinions ought to have weight. In an address delivered on

the two hundred and fiftieth Anniversary of Harvard College, Mr. James C. Carter, who, if not the leader of the New York Bar, is certainly second to none, expressed himself as follows :

"What is it that a student goes to a Law School to learn? What is it to begin the study of what we call 'the law'? What is this thing which we call 'law,' and with the administration of which we have to deal? Where is it found? How are we to know it? It is not found in that code which was proclaimed amid the thunders of Sinai! It is not immediately and directly found in the precepts of the gospel. It is not found in the teachings of Socrates or Plato, or Bacon. It is alone found in those adjudications, those judgments which from time to time, its ministers and its magistrates are called upon to make in determining the actual rights of men.

"What was our former method of acquiring it? Going primarily to those judgments? No, for the most part the basis of these investigations was in the study of text books, the authors of which if they had acquired any knowledge of law for themselves, must have obtained it by resorting to those original sources. We, therefore, got it at second-hand. I think the result of all investigations concerning the method by which any science may be acquired and cultivated, has been to teach us to go to the original sources, and not to take anything at second-hand.

"Now, is this method open to the objections that the study of cases is apt to make the student a mere case lawyer? Not at all. The purpose is to study the great and principal cases in which are the real sources of the law, and to extract from them the rules which, when discovered, are found to be superior to all cases.

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"This method of studying law, by going to its original sources, is no royal road, no primrose path. It is full of difficulties. It requires struggle. If there is anything which is calculated to try the human faculties in the highest degree it is to take up the complicated facts of different cases; to separate the material from the immaterial, the relevant from the irrelevant; to assign to each element its due weight and limitation and to give to different competing principles and rules of law their due place in the conclusion that is to be formed, and I know on the other hand of no greater intellectual gratification than those which follow from the solution in this way of the great problems of the law as they successively present themselves."

In April 1889, Sir Frederick Pollock in the fifth volume of the *Law Quarterly Review*, at page 228, expressed himself as follows:

"Not many English lawyers have seen a Harvard class at work. Those who have, will agree, we think, with Mr. Fisher that the system is a thoroughly sound and practical one. One of the first and greatest fallacies besetting law students is to suppose that law can be learned by reading *about* the authorities. Professor Langdell's method (for it should justly bear the name of the inventor) strikes at the root of this."^a

^a I have assumed Sir Frederick Pollock to be the author of the above statement for the reason that it appears in the editorial notes of the *Law Quarterly Review*, of which he is the able and learned editor.

Mr. Dicey in the second volume of the *Law Quarterly Review*, at page 88, in reviewing Finch's Cases on Contracts, says:

"To master the rules of English law you must study these rules as applied to the affairs of life. They are maxims which derive their full real force from their application to cases. As Paulus excellently said of Roman law, confuting by anticipation the pretentious and shallow writers who fancied that Roman lawyers were less practical than English ones, '*Non ex regula ius sumatur, sed ex iure quod est regula fiat.*' Judicial decisions are legal experiments; reports are the record of such experiments, our evidence of '*ius quod est.*' The lawyer or student who really enters into the results of a line of leading cases learns more than a few verbal maxims which may be committed to memory. He sees what is the true meaning of legal doctrines when applied to facts; he 'becomes,' as Mr. Finch well expresses it, 'familiar with the tone of thought, the attitude of mind, which prevail in our courts, he gets a touch of the genius of English law; I may venture to add of the English race.' He learns in short, by the only method by which it can be learned, the notion of justice which the lawyers and judges of England have developed by labors extending over centuries, and have impressed upon the minds of English people." *b*

I said at the beginning of this article that the case system was with a slight modification followed by the members of the Columbia Law Faculty. Some of us have thought that if one who had never studied law could first be made familiar with the outlines of certain topics before taking up the principles in their application as illustrated by the cases, the ground would be as effectually covered and his mind would better grasp the principles involved, than if, being an entire stranger to the subject of law, he were immediately put at work upon cases. Accordingly Professor Burdick has published a selection of cases upon Torts to be used in connection with Pollock on Torts, and I have published "Selections on Contracts," consisting of selections from Leake's Elements of the Law of Contracts, and Finch's Cases on Contracts, the text of Leake on a given topic preceding the cases from Finch and being discussed and criticised in the class room before the cases on that topic are taken up.

I was induced by my experience at Harvard to try the effect of such a modification. The experience of the last five months justifies me in saying that its effect is to remove an objection to the case system which I have always considered a forcible one, namely, that to plunge a beginner, unacquainted with technical terms and expressions, and with legal modes of thought, into a mass of conflicting authorities, must produce great confusion of thought, resulting in discouragement on the part of the student,

b This review is written over the initials "A. V. D." which is my reason for attributing it to Mr. Dicey.

and causing a loss of valuable time without a sufficient compensation for its loss. The result has, in my opinion, justified the experiment. The student having had the benefit of some preliminary instruction, reads the cases more intelligently and as a consequence grasps the principles involved more quickly and quite as firmly as if his study had been confined to the study of cases. And yet while the student *thinks* quite as freely and as independently in dealing with the cases, he certainly *guesses* less than when he studies the cases without the aid of any preliminary instruction.

This modification is intended to be limited to the first year, and to certain branches of the law. My own experience has convinced me that a student who is not able after a year of such drill, to deal with legal problems as involved in the study of cases, is not intellectually fitted to pursue the study of law.

It must be admitted that this system is not the "short cut" to the law. It takes time, but in three years one can under this system very thoroughly cover the field of law.

It must also be admitted that this system does not proceed on the idea of "the law made easy." Its advocates believe the law to be a difficult science which can only be made easy at the expense of thoroughness, and therefore at the expense of the student.

In conclusion I would say: 1. The cardinal difference between the method which I have attempted to describe, and any other method of instruction by which law is taught as a science, is that the student is required to deal with the original sources of the law, and does not take his law at second hand. The method instead of being a set system, is so flexible that two men might use it as a basis of instruction, and the teaching of the one hardly suggest the teaching of the other. It is distinctly a method for the development of individuality in teaching.

2. I think that time can be saved without the sacrifice of substantial benefit *in the first year*, by discussing in some subjects the elementary principles as stated by text writers before discussing the cases on a given topic. This simply for the purpose of acquainting the student with legal modes of thought and expression.

3. In his subsequent study I would eliminate the use of text books, except for purposes of reference and comparison, and would have the student learn his law by the statement, analysis and discussion of cases under the direction and guidance of a competent instructor.

III.

BY PROF. CHRISTOPHER G. TIEDEMAN,
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The question of legal education is receiving more attention in this country than it has ever before had given to it. This great manifestation of interest in discussions over the merits of different methods of instruction cannot fail to be productive of great good by the detection of whatever is faulty in each of the so-called methods of instruction, and the possible construction of a new system, composed of whatever is found to be good in the several prevalent methods. But the caution must be observed that, after all, no iron-cast method of instruction can be successful in actual application, however flawless it may seem to be in theory. The individuality of the teacher must not be paralyzed by any fixed system of instruction. For the native talent of the professor for teaching counts for a great deal more than the peculiarities of his method of instruction. And very often the strong personality of the teacher will successfully conceal the defects of the methods which he employs. But after due allowance has been made for the full play of the teacher's individuality, methods of instruction may be made to conform to general principles, and may be improved or made worse according to the correctness of the fundamental principles upon which they are established. Bearing in mind that a very poor and fundamentally faulty method of instruction may be made to produce satisfactory results by the indefinable and immeasurable influence of a truly great teacher and eliminating, as far as possible, this personal equation from the criticism of different methods of instruction, there is but one way to ascertain with any reliability their respective merits and demerits, and that is, by a criticism of the soundness or unsoundness of the fundamental conceptions of the law upon which they are based.

In the first place, a distinction should be made between the relative merits of methods of instruction and of the materials used in imparting instruction. If I have not entirely misconceived the character of the discussions which have been provoked by recent events, and by the active interference of the American Bar Association, they principally relate to the character of the materials employed in giving instruction, and not to rival methods of instruction. There are but two essentially different methods of legal instruction in use in this country, viz.: the European system

of formal lectures with or without the collateral aid of the seminary, and on the other hand, instruction by a combination of recitations and informal discussions of questions and principles of law in proportions varying with the individuality of the teacher. In many of the law schools, probably in the great majority of them, both methods are employed to some extent, but only two prominent law schools employ the first method more or less exclusively. If I have not been misinformed, the other prominent law schools of the country, as well as the great majority of the smaller schools, employ in the main the latter method of instruction, *i. e.*, by recitation and informal discussion by teacher and student. If the law students of any one school were composed entirely of college-bred men, and therefore possessed of more or less well-trained minds, the former method of instruction is in my judgment unquestionably superior to the latter. For if the duty of the teacher is to explain and discuss the principles and rules of law, he can do so more effectively and can accomplish more in a given time, if he is not obliged to take up his time with catechising the students, and listening to their opinions, which even in the case of college-bred men must be the immature reflections of a tyro. And that method of instruction would be brought to a state of comparative perfection, if the lecturer were to place in the hands of his hearers an elementary treatise on the subject of his instruction, whose treatment and analysis he follows in his lectures so that the student can come to the class-room already possessed of information concerning the elementary principles, sufficient to enable the professor to proceed directly to the more profound discussions of the subject, and to the practical application of these principles to the variety of cases, which the teacher can best draw from the adjudications of the courts. This is the system which I learned to admire while sitting under the skillful instruction of the celebrated von Ihering of the University of Goettingen.

But the formal lecture is not suited for the ordinary American law school, for the reason that the average law student does not come to the law school with such a trained mind as a college course generally insures. I cannot think there is much doubt that as long as the law schools are obliged, in the consideration of the highest interests of the legal profession, to accommodate themselves to the needs of students who come to them with untrained minds, the latter method of instruction, *i. e.*, of recitation and informal colloquies, is the best adapted to our present needs. I believe that the legal profession generally entertain the same

opinion. At any rate, with very few exceptions,—and the most prominent law schools do not constitute these exceptions,—the common method of instruction is the one described as a combination of recitations and colloquy.

The most serious discussion relates not so much to methods of instruction, in the sense in which I employ the terms here, as to the materials used in giving the instruction. The important inquiry, to which I understand myself to have been invited to principally direct myself, in the present instance, is concerning the relative value of the use of text-books or treatises or, of leading adjudicated cases, in giving legal instruction. As I understand it, both parties to this controversy substantially agree that the instruction in the class-room should generally assume the informal character of a recitation and colloquy, their point of difference being the materials from which the student is to recite, and about which the colloquy is to be had.

The relative value of text-books and of adjudicated cases in giving legal instruction can only be determined, as I stated above, by a criticism of the conceptions of law which underlie the contention, and the aims held in view in providing for legal instruction.

There are four things to be attained by systematic legal instruction, and no system is complete which does not make provision for the attainment of all of them, viz: to teach (1) what is the law; (2) how law is evolved or made; (3) how to extract the ruling principle of law from an adjudicated case; (4) how to apply known principles of law to new cases as they arise.

No one would deny that the study of actual cases will alone satisfy the third and fourth requirements of legal education, as just set forth. Nor can there be much doubt that a student cannot learn how law is made, unless he studies adjudicated cases, even where the particular matter is regulated by statute. For the statute does not always contain the true living rule of conduct. The true rule or rules, which are produced by the enactment of a statute, are not to be found in the letter of the statute, but in the construction placed upon it by the courts. The law student cannot find in the Statute of Frauds all that is necessary for him to determine when a writing is necessary to the validity of a contract. He must look for an accurate answer to his inquiry to the thousands of cases in which the provisions of the statute of frauds have been construed and modified in their application to particular cases, or he must go to some reliable treatise on the subject, whose author has made the investigation for him. The student

should be made to understand that the edicts of the legislature are not in themselves necessarily living law, except so far as they reflect the prevalent sense of right, but that the real rule of civil conduct is to be extracted from the cases, in which the statutory rule finds in its application to individual litigation the more or less serious modification which is necessary to bring it into conformity with the popular sense of right.

The second and third aims of legal education, as here differentiated, only serve to teach the student how to discover for himself what is the law, while the fourth gives him an opportunity to learn how to make a practical use of his legal knowledge. Legal educators may differ as to the amount of time which should be devoted in a law school course to the attainment of these three elements of professional education ; but they cannot seriously deny that the study of cases is the only method by which this instruction may be imparted. Nor can there be much cause for doubt or dispute that the major part of a law school course must be devoted, not to teaching how law is evolved, or how to extract the law from adjudicated cases, or how to apply it to new cases, important as these things are, but to teaching what is the law, what are the principles, general and special, which give logical shape to all systems of jurisprudence. And it is at this point in the discussion of educational methods, that there is the greatest cause for contention.

There is very little room for doubt that, at least in the Anglo-Saxon world, the adjudicated cases are the great reservoir of legal learning, and that the original investigator must go to these cases for the materials out of which he may construct our jurisprudence, or satisfy the more modest desire of ascertaining what is the law of the land on a particular subject. But he would use the cases not for the purpose of learning directly from them what is the law, but to discover, as the scientific investigator hopes by his experiments with the forces of nature, the fundamental principles underlying the concrete manifestations of their influence. If the chemist or physicist, or biologist, wants to learn what is already known about their respective sciences, he goes to the treatises in which are recorded the results of the investigations of others. He does not open the book of nature, and expect to find therein the principles set forth in such intelligible terms as that he who runs may read. He goes to his library, instead of to his laboratory.

The adjudicated cases constitute nothing more than materials out of which the scientific jurist is to construct a science of juris-

prudence. They are not law in themselves, they are but applications of the law to particular cases. Law is not *made* by the courts, at the most only promulgated by them. Any one who believes that judges are free agents in the rendition of decrees and judgments, may be inclined to question the soundness of the last proposition. But he who is fully persuaded that law is not the independent creation of the judicial mind, but is the resultant of the social forces reflecting the popular sense of right, will readily give his assent. The judge is but an instrument for the promulgation of this popular sense of right in its particular application to the cause at issue. When I first met with the proposition, which is so often enunciated by legal writers, as a proper and satisfying explanation of the relation of statutory law and "judge-made" law, as Bentham contemptuously calls it, that the judge, in rendering a decision on a novel question, or in modifying a principle of law which has been previously enunciated, does not make law but only declares what was the pre-existing, although perhaps as yet unexpressed, law—I was inclined to repudiate the doctrine altogether as a fiction, and to give my approval to Bentham's criticism of this judicial liberty. But when I looked deeper into the origin of the law, and satisfied myself that all law, so far as it constituted a living rule of civil conduct, whether it takes the form of statute or of judicial decision, is but an expression of the popular sense of right through the popular agents, the legislator or the judge as the case may be—then a new light was thrown upon what I was inclined to pronounce an unwarrantable fiction, and I believed all the more firmly that neither the judge nor the legislator makes living law, but only declares that to be the law, which has been forced upon them, whether consciously or unconsciously, by the pressure of the popular sense of right, that popular sense of right being itself but the resultant of the social forces which are at play in every organized society.

If this be the true conception of the origin and development of law, then it must be conceded that learning what principles of law have been given birth or have been more or less modified in a particular decision or set of decisions is not an elementary work which may be entrusted to beginners, or which law students, at least in the earlier stages of their professional training, may be expected to do satisfactorily to themselves and to their teachers. In the first place, the whole law or any appreciable part of it, on a particular subject, cannot be learned from the study of a few leading cases, but only from a very large number of cases. For example, in order to learn the law in relation to the requirements

of the statute of frauds, one would have to read not a few cases, but thousands of cases. To teach law by cases, — granting for the present that it is possible to teach law as a science by cases alone, — it would require an incredible length of time to teach even the elementary law.

But apart from the physical impossibility of reading enough cases in order to enable the student to learn the law in the time to which the exigencies of American life require a law school course to be limited, the legal tyro is not mentally capable of extracting the principles of the law from adjudicated cases, even though he be a college bred man, and possessed of more than the average of ability and industry. A few men of extraordinary mental powers may be able to collect together and formulate correctly, by the study of cases alone, the principles upon which the adjudications rest, but the average student will, by such a system of instruction, if pursued exclusively, be impressed with the great weight of judicial precedent, and he will become, what is so generally deprecated, a case-lawyer, who thinks the whole business of advocacy consists of persuading the court that the cases he cites in support of his side of the controversy, are to be followed, not because they enunciate a profound scientific truth, but merely because they have given judgment for the plaintiff or defendant on a similar statement of facts. The higher aim of their instructors to make of them conspicuously original investigators in the law is lost on the average law students. Law students, in the present state of public opinion, are inclined to consider rules of law, as they are enunciated by the court, as distinct and independent propositions, which may be strung together in a digest in some more or less orderly manner, but which have no logical connection, leading up to the formation of a compact scientific system of jurisprudence. And it strikes me that this evil, so far at least as the average student is concerned, will be intensified by telling him that he must learn the law from the cases alone. The average student will not do the necessary work in order to be able to construct for himself, out of the mass of judicial decisions, an orderly and logical presentation of the fundamental principles, which are the groundwork of every system of jurisprudence, and a knowledge of which is absolutely essential to any scientific conception of the law as a whole, or in the detailed application to special cases in actual practice.

If it taxes the mental energies of the most experienced and skillful of our law writers to present accurately and logically the law on a given subject, so as to guide and not to mislead the active

practitioner and judge in the winning and settlement of judicial contests, we certainly cannot expect the student to do this work satisfactorily or accurately. One of the most successful of our American legal authors once observed in my presence that he often found it impossible to discover the common principle by which conflicting decisions, even of the same court, may be reconciled. He did not refer to cases in which there was a direct repudiation of a prior decision, but to those cases in which there was an express or implied confirmation of the prior decision, but with so great a departure in practical results, as to force one at least to the conclusion, that the later decision imposes a serious modification of the rule of law as laid down in the prior decision. To present in a clear light the rule of law, as it emerges in a modified form, from the clashing interests represented by two or more decisions requires the skill and leisure of the experienced legal author. The busy practitioner has not the time, and the tyro has not the skill or experience to enable him to escape the confusion of ideas which the reading of conflicting decisions occasions.

But even if the student is capable of doing this work from which old practitioners shrink, why should he be forced to learn the law exclusively in this laborious and difficult manner? Must he be denied the privilege, which the students of medicine, chemistry and the other sciences enjoy, of learning at the outset of his study from treatises what other original investigators have discovered? Like the student of the different sciences, the law student must learn how to make original investigations for himself, and diagnose, so to speak, the principles of law from the cases in actual litigation. But no reason can be given why he must learn the whole science of the law by his own investigations in the undigested mass of raw material in the shape of adjudicated cases. No medical school can pretend to give a complete course of instruction at the present day, without introducing into its curriculum a comprehensive course of clinics. Nor does the professor of physics or chemistry teach these sciences exclusively by the use of the text-books and pictorial representations of the various experiments as was once the practice. But the instructors of these sciences have not discarded the treatise; they have only supplemented the use of the treatise with the resort to the laboratory and operating room.

The difficulty in reaching a common agreement in the present discussion over methods and means of legal instruction is the difficulty which is often experienced in finding the middle and true ground of a controversy. Impressed by the defects of the

older systems of instruction, in which the law student was presented with more or less abstract propositions of law, with the aid of text-books, which often were either nothing more than digests of the cases, and put together in an illogical and disorderly manner, or whose statements of the law were so loose and inaccurate as to prove misleading; and more impressed with the necessity of "legal clinics" in the course of instruction in the law school instead of being left for acquisition in the law office, the advocates of instruction by cases have gone to the opposite extreme of placing too high a value upon the study of cases, and of unduly depreciating the value of the study of theoretic law, apart from learning it through the medium of practical law. But notwithstanding their undue appreciation of the study of cases, they tacitly concede its inefficiency as a sole means of learning the law, by accompanying the study of the cases with a glossary or commentary of that part of the law, which is treated in the cases. The cases are therefore used merely as illustrations of the law which is set forth in the commentary, which is either given to the student in printed form or imparted by the professor in his class-room instruction. If the commentary consists of a scientific and logical treatment of the branch of law selected, corresponding to the methods adopted by the better legal treatises of modern times, the instruction by cases differs only from the instruction with the aid of the best text-books, in that the illustrations of the law constitute the text, while the law is put into foot notes, and has the disadvantage of misleading the student as to what is, and what is not the nature of the law. If the glossary or commentary is nothing more than a digest of the cases for which space could not be found in the text, then the employment of such a book in a class-room instruction will not avoid many of the evils which were complained of under the older *regime*.

The advocates of instruction by the use of cases have effected an important reform in legal education by arousing the law schools of the country to the importance of infusing more life into their instruction, and of introducing into their curricula what I would call "legal clinics," and for this great good the legal profession should be grateful to them. But the great danger of driving out of the schools all scientific study of the fundamentals of the law in the unchecked study from the cases of isolated propositions of the law, ought not to be lost sight of. I think we may, in this connection, consider with profit the order of legal instruction pursued at the German universities. In the first half of their three years' course, the student gets nothing but theoretic and relatively elementary law, which he gleans from the lectures of the professor and

from treatises, corresponding to the English and American text-book. The same course of instruction is maintained to the end of the university course, except that the seminarium is added, in which the student gets his first insight into practical law, and where the method of instruction is practically a study of law by cases, except that the cases are in the main hypothetical. When the student receives his doctorate, he is enrolled among the officials of the court as a *referendar*, performing duties as an assistant to the judges, which are calculated to give him the practical experience which is aimed at by the law in many of the American States in requiring of candidates for the bar an apprenticeship or clerkship in a practicing lawyer's office.

If I were called upon to establish a course of legal instruction, I would follow the German methods as nearly as the situation and public opinion in America would allow. I would make the course in the law school three years. During the first year, I would confine the student to the study of the fundamental principles of the law with the aid of the most approved treatises, and without any resort to cases, except by the instructor, who would use them in the class-room for the purpose of illustrating the text. The second year would be in the main similar to the course of instruction of the first year, with a partial introduction of "legal clinics" and of the seminary methods. In the third year the instruction would largely consist of the study of cases, and of practice and pleading.

During the entire course in the law school I would place the ban upon the resort of the student to the law office. His clerkship in the law office should begin upon his graduation from the law school.

Although the views here presented, reflect no one's opinions but my own I desire to say in conclusion that, in the University of the City of New York, of whose faculty I am a member, no one method of instruction is followed exclusively: all methods are in turn adopted so far as they seem to serve the purpose of making lawyers out of the young men who come to us; and each professor is permitted to adopt whatever methods will enable him to give the best expression to his own individuality.

IV.

THE FOLLOWING WAS ORIGINALLY PART OF A LETTER FROM PROF. J. C. GRAY
OF THE HARVARD LAW SCHOOL TO THE EDITORS.

In all law schools, I suppose, the students learn from text books, cases, and oral instruction. At any rate they do so here. Each teacher is free to use these means as he pleases. The different professors do actually use them in different ways and proportions, and so does each professor, as he is dealing with different topics. But, while in most law schools, the text book is the basis of instruction, and the lecture and sometimes a reported case is employed to explain or illustrate (or it may be, contradict) the text book, with us the *predominant* mode of study is to make reported cases the basis of instruction and to use oral instruction and the consultation of texts books as aids in drawing out, formulating and classifying the principles involved in the decisions.

Therefore on any topic, in most of the courses, the students are referred to cases in chronological order, which are largely collected into volumes, so that each student may have for himself a small library of selected authorities. These cases having been read by the students before each (so called) lecture, they are there asked to state them, to deduce the principles which govern them, to discuss them, to suggest distinctions, and to formulate results, the professor directing and controlling.

Among the reasons why this practice has been so generally adopted here, are the following:

a.—It accustoms the student to consider the law not merely as a series of propositions having, like a succession of problems in geometry, only a logical interdependence, but as a living thing, with a continuous history, sloughing off the old, taking on the new. The acquisition of this attitude towards the law is likely to be deemed of fundamental importance according as a professor is a believer in the common law. We are all here firm believers in it. We desire that the students may be filled with its spirit.

b.—The reading of text books on a subject of which one as yet knows nothing is dreary work; a student is apt to come from it into lecture with practically an empty mind. But we find that students, in reading cases, whether they approve, or disapprove, or are in doubt, or perplexity, yet come into lecture interested, and eager to express their views, or to have their doubts determined, or their perplexities removed.

It is well to study a question and puzzle over it before one gets the formulated answer.

I think a professor sometimes fails to realize how very dull a text book is to students. He himself knows a good deal about the subject, the leading authorities are familiar to him, he is aware of the difficult and doubtful points, he probably has had a case involving them in practice, very likely he has lost his case, and perhaps his temper too; it is all very real to him, and so he takes up the text book, eager to see what the author has to say; whether he agrees with it or not, it is *interesting*. But to the students this background is wanting. The professor thinks "what an admirable, exact and lucid statement of these difficult and complicated topics, it is just the book for students; they cannot help finding it delightful." But the students, not having had any experience of the difficulties and complications, cannot appreciate the merits of the book; they are not delighted with it at all. They find it hard to keep awake over it.

c.—To extract law from facts is *the* thing that a lawyer has to do all his life; to do it well makes the successful lawyer; to do it pre-eminently well makes the great lawyer; a student cannot begin it too early.

d.—Lectures and questions on lectures are apt to be, and perhaps necessarily must be, adapted to the students of slower apprehensions. To the quicker witted they are a bore and a waste of time. But to tackle a tough bit of pleading, or the detail of an involved business transaction, or the provisions of a complicated will, to make oneself rapidly a master of them, and to be able to give a neat oral statement of the facts and the precise point of law involved, and to show how the decision has extended or modified the law as previously held, will give full occupation to all the faculties of the cleverest man. Our experience has been that the greater the legal ability of a student, the more readily does he take to, and the more thoroughly enjoy this mode of study.

e.—Many bright young men in school and college develop an extraordinary capacity for having other people's ideas pumped into them, and win rank and reputation thereby, but they have never intellectually "labored" in their lives. Our mode of study is a sharp break in their habits and traditions. The result is at first perturbing, often amusingly so, but it is invariably salutary.

f.—This dealing with actual cases is an effectual corrective to unreal and fantastic speculation, which is the most dangerous tendency of academic education.

I will take the liberty of referring you to a short article I wrote on "Cases and Treatises," 22 Am. L. Rev. 756.

I have no love and scant respect for *a priori* dogmatism in legal education. When I talk myself or hear others talk of the "case system" or the "Harvard system" or any other "system," I feel a slight instinctive disgust; it is not entirely reasonable I admit, but it has some justification. A man who has much to say about "systems" is sailing perilously near the shoals of cant. Not by their systems but by their fruits shall ye know them.

If a school is filled with hard and enthusiastic workers of a superior intellectual training, if its graduates, all with credit, and many with brilliancy, have passed repeated searching examinations on the fundamental doctrines of law and equity and their practical applications, and if its past members look back on its works and ways with strong feelings of approval and gratitude, such feelings being the strongest in those whose success and ability in the profession have been the most marked, then, "system" or no "system," that school, wherever it may be, is not far from the kingdom.